UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

JUICE PRESS, LLC,		
and	Cases:	29-CA-191213
		29-CA-191348
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO,		29-CA-191557
		29-CA-199747
		29-CA-199951
and		29-CA-200565
		29-CA-201233
THIERNO DIALLO, an Individual,		29-CA-201624
		29-CA-202842
and		29-RC-190281
CHRISTOPHER CARABALLO, an Individual,	Green, B., ALJ	
and		
DANIEL MIRANDA, an Individual,		
and		
DANIEL UVALDO, an Individual.		

POST-HEARING BRIEF OF CHARGING PARTY AND PETITIONER
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

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PRELIMINARY STATEMENT

Charging Party and Petitioner Local 1181-1061, Amalgamated Transit Union, AFL-CIO (hereinafter "Local 1181" or "the Union"), respectfully submits this post-hearing brief in the above-captioned case. As set forth herein, Respondent Juice Press, LLC ("the Company") violated the Act as alleged in the Order Further Consolidating Cases, Second Consolidated Amended Complaint and Notice of Hearing ("Complaint"). The Company also engaged in misconduct that reasonably tended to interfere with employees' free choice and/or affect the results of the January 23, 2017 representation election as set forth in the Regional Director's Decision on Objections, Order Consolidating Cases and Notice of Hearing ("Decision on Objections").

Local 1181 understands that Counsel for the General Counsel is submitting a comprehensive post-hearing brief. Rather than cover the same subjects in similar detail, Local 1181 addresses herein selected arguments that the Company made at the hearing, Local 1181's request for a bargaining order pursuant to the Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), and the appropriate remedy with respect to the Objections.[1]

[1]We cite herein to the transcript in this case as "Tr. __." We refer to exhibits in the record as follows: General Counsel's Exhibits are "GC Ex. __"; Charging Party Local 1181's Exhibits are "CP Ex. __"; the Company's Exhibits are "Resp. Ex. __"; and Joint Exhibits are "Jt. Ex. __".

ARGUMENT

I. THE COMPANY'S EXPLANATIONS FOR DISCIPLINING AND DISCHARGING EMPLOYEES AS ALLEGED IN THE COMPLAINT ARE PRETEXTS. THE COMPANY DISCIPLINED AND DISCHARGED EMPLOYEES BECAUSE THEY ASSISTED AND SUPPORTED LOCAL 1181 OR ENGAGED IN OTHER CONCERTED ACTIVITIES, AND TO DISCOURAGE EMPLOYEES FROM SUPPORTING LOCAL 1181.

A. The Company's shifting explanations for disciplinary actions should not be credited.

The Board has long held that shifting defenses signify that the proffered reasons for an action are pretextual. See, e.g., Airport 2000 Concessions, LLC, 346 NLRB 958, 978 (2006); Johnson Distributorship, Inc., 323 NLRB 1213, 1222 (1997) ("when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted.").

Of particular pertinence to this case, the Board has found conduct unlawful when an employer set forth different explanations in a position statement and at trial. See Black Entertainment Television, Inc., 324 NLRB 1161, 1161 (1997); Vincent M. Ippolito, Inc., 313 NLRB 715, 724 (1994), enf'd, 54 F.3d 769 (3d Cir. 1995).

The Company's position statements and other evidence show that the Company changed its explanations for its disciplinary actions, in particular with respect to the discharges of Tequaan Daniels ("Daniels") and Daniel Miranda

("Miranda").[2] The Company did not explain these changes at the hearing. Thus, the testimony of Company witnesses is not credible on these subjects at the least.

Tequaan Daniels. The Company's articulated explanation for discharging Daniels changed from lateness and absenteeism to disrespectful conduct in a meeting.

According to a Company document dated January 12, 2017, memorializing Daniels' termination, the Company discharged Daniels because "he was consistently coming late to work, and not showing to work," and "he [f]ailed to complete duties." Resp. Ex. 26.

Consistent with the January 12, 2017 document, the Company's position letter submitted during the Board's investigation asserted that the Company "terminated Mr. Daniels because of his chronic lateness and failure to show up to work." GC Ex. 34 at 1.

The Company did not assert in the January 12, 2017 document or the Company's position letter that Daniels' behavior at a January 12, 2017 meeting contributed to his discharge. To the contrary, the position letter states that manager Shawn Edelman ("Edelman") and supervisor Mario Guevara ("Guevara") met with

[2]We address other evidence and arguments specifically concerning the Company's disciplinary actions against Daniels in Point I(E).

Daniels to terminate him. See GC Ex. 34 at 3 and Exhibit J to the position letter (in evidence as GC Ex. 17).[3]

Company witnesses changed course. Edelman and Guevara testified that Daniels was discharged because he engaged in disrespectful conduct at the January 12, 2017 meeting. Edelman and Guevara testified that they met with Daniels on January 12, 2017 to discuss his lateness and absence issues, but they were not planning to terminate Daniels. See Tr. 1101-02, 1106, 1147 (Edelman); Tr. 1239-40 (Guevara). At the meeting, Edelman said Daniels was upset, agitated, and cursing. See Tr. 1104, 1175. Guevara said Daniels was "bothered" and "there was no respect towards those of us in the meeting." See Tr. 1202. Later that day, Edelman decided to discharge Daniels based on Daniels' conduct at the meeting. See Tr. 1174 (Edelman), 1239-40 (Guevara).[4]

The true reason that the Company discharged Daniels was his support for Local 1181. Indeed, when Guevara was asked what he knew on January 12, 2017 about how Daniels felt about the Union, Guevara dodged the question and said he did not speak to Daniels about that. See Tr. 1205-06. By the time that Edelman and Guevara testified as witnesses called by the Company, Counsel for the General

[3]Another supervisor, Adys, attended the alleged meeting, but did not testify. See GC Ex. 17.

[4]Edelman and Guevara disagree on who told Daniels he was fired. Edelman says Guevara called Daniels. See Tr. 1107. Guevara says he did not call Daniels, Edelman would have called. See Tr. 1226-27, 1232.

Counsel had established that the record contained compelling evidence that the Company would not have discharged Daniels for lateness and absenteeism. Contrary to the assertions in the Company's position statement, the Company had treated Daniels and many other employees with attendance issues far more leniently. The Company's witnesses' belated attempts to bolster the grounds for Daniels' discharge should not be credited in light of the absence of any reference to Daniels' conduct at the January 12, 2017 meeting in the Company's documents or position statement. There is no good reason for the Company to have omitted such a reference, and every reason for the Company to have stated that Daniels was terminated for unbecoming conduct in its internal documentation and position statement.

Moreover, the Company had not formally disciplined Daniels for verbal abuse, insubordination, or unbecoming conduct prior to terminating him, and Edelman and Guevara did not claim that anyone warned Daniels that his alleged conduct at the meeting could result in his discharge.

Thus, the effect of Edelman's and Guevara's pertinent testimony was to reveal all of the Company's articulated grounds for Daniels' discharge as pretexts.

Daniel Miranda. According to a Company document dated July 7, 2017, memorializing Miranda's June 19, 2017 termination, the Company discharged Miranda because he was "[d]isrespectful and verbally abusive towards other

employees." Resp. Ex. 29. The Company did not explain the delay in the preparation of this document.

The Company's July 11, 2017 position letter asserted that the Company terminated Miranda for gross misconduct. Although the position letter reviewed Miranda's record, the only incident described in the position letter that occurred in the month preceding Miranda's discharge occurred on June 15, 2017, when Miranda was allegedly "grossly disrespectful and verbally abusive toward another Commissary employee." Specifically, the position letter alleges that Miranda cursed and shouted at co-worker Carmen Garcia. See GC Ex. 35 at 3.

Edelman again explained Miranda's discharge differently. Edelman testified that he and Guevara met with Miranda on June 19, 2017 to counsel Miranda about lateness and co-workers' complaints. See Tr. 1152-54. At the meeting, according to Edelman, Miranda smelled of marijuana and was non-responsive so Edelman sent Miranda home. See Tr. 1111-14, 1153-54. Since Edelman planned to counsel Miranda at the meeting, the conclusion to be drawn from Edelman's testimony is that he discharged Miranda because of his condition at the meeting and a prior incident when Edelman alleges that he observed Miranda smoking marijuana during his shift. See Tr. 1112.

Guevara did not testify about Miranda's discharge. Guevara's failure to testify about Miranda's discharge casts further doubts upon the Company's articulated reasons for Miranda's discharge.

The Company document memorializing Miranda's termination and the Company's position statement do not reference Miranda's conduct in any meeting with Edelman.

Miranda's audiotape of the June 19, 2017 meeting (GC Ex. 32) and Miranda's testimony demonstrate that Edelman told Miranda he was not discharging him for misconduct, but because Edelman was cutting back and changing things in Miranda's area. Edelman told Miranda that Edelman would look for another position for Miranda. See GC Ex. 32; Tr. 526-28 (Miranda); see also Tr. 726 (Jose Guitia overheard Edelman tell Miranda that he did not have a reason to fire him but he was letting him go).

Miranda had not previously been formally disciplined for tardiness or for inappropriate behavior towards co-workers.

The Company's inconsistent statements about the reasons for Miranda's discharge again reveal all of the Company's articulated grounds for Miranda's discharge as pretexts.

B. The Company's explanations for terminating certain employees should not be credited because the Company did not listen to the employees' explanations.

The Board considers an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before the employer imposes discipline to be significant evidence of discriminatory motive. See Johnson Distributorship, Inc., 323 NLRB at 1222; A and G, Inc., 351 NLRB 1287, 1288 (2007) (decision to discharge employees before giving them an opportunity to explain allegations supports conclusion that discharges were discriminatorily motivated); Midnight Rose Hotel & Casino, Inc., 343 NLRB 1003, 1004-05 (2004), aff'd, 198 Fed. Appx. 752 (10th Cir. 2006) (failures to conduct a fair investigation and to give employee an opportunity to explain actions support findings that employer did not act on belief that employee committed theft and that discipline was discriminatorily motivated); Management Consulting, Inc., 349 NLRB 249, 264 (2007) (plainly flawed investigation, including failure to obtain employee's version of events and ignoring exculpatory facts, supports inference that employer was looking for a reason to terminate employee). Deviations from disciplinary methods are also indications of unlawful motive. See, e.g., Nor-Cal Security, A Division of Master Security Servs., 270 NLRB 543, 552 (1984).

The Company discharged Thierno Diallo ("Diallo"), Christopher Caraballo ("Caraballo"), and Jaby Sadio ("Sadio") without listening to their explanations or

versions of events even though the Company's practice, according to Edelman, was for Edelman or manager James Asaro ("Asaro") to obtain the employee's version of events before discharging an employee. See Tr. 770, 813.

Thierno Diallo. Company witnesses presented conflicting accounts of how the decision to discharge Diallo was reached, but no Company witness testified that anyone provided Diallo an opportunity before he was discharged to respond to supervisor Julian Peters' ("Peters") report that Diallo was talking on his phone in the production area during his shift.

According to Asaro, he, Edelman, and Guevara decided to discharge Diallo without talking to Diallo. See Tr. 964, 1036. Thus, Asaro was under the misimpression that Peters found Diallo watching video on his phone during his shift, which Asaro considered egregious. See Tr. 964, 1013 (Asaro).[5] No other witness contended, and no other document suggests, that Diallo was watching video or that Peters told anyone that Diallo was watching video.

According to Guevara, he, Edelman, and Asaro spoke in person and decided to terminate Diallo. Guevara told Edelman and Asaro that Diallo was talking on the phone in the production area. See Tr. 1207-08, 1228. Guevara said he asked Diallo about the incident, but could not recall whether he asked before Diallo was

[5]The Company permitted another employee to Facetime with his family in Senegal during his shift. The Company issued that employee a written warning after talking to him several times because the Company did not want him to be on his phone in the kitchen. See Tr. 806 (Edelman).

discharged or what Diallo responded. See Tr. 1236-37. Thus, Guevera's testimony that he asked Diallo about the incident is dubious.

According to Edelman, and inconsistent with the other witnesses' testimony, Edelman was not involved in Diallo's termination. Edelman did not recall if he was consulted, if he had any understanding of why Diallo was terminated, or if he made any inquiry into the grounds for Diallo's termination. See Tr. 1168-70.

Asaro, Guevara, and Edelman did not explain why they did not give Diallo an opportunity to respond to Peters' allegation before they terminated Diallo. Diallo testified that he was not using his phone, he was charging it. See Tr. 581-82. The Company's witnesses' failure to obtain Diallo's side of the story and inconsistent testimony on the circumstances surrounding the decision to discharge Diallo show that Edelman, Asaro, and Guevara were not interested in whether Diallo engaged in misconduct, only that they had (they believed) an excuse to discharge Diallo to cover their true unlawful motivation.

Christopher Caraballo. Asaro did not speak to Caraballo before deciding to terminate Caraballo. See Tr. 1041-42. If he had, Asaro would have learned that Caraballo generally left work early on Sundays, that Caraballo was not aware of any requirement to report that he was leaving early once he finished his work on Sundays, that Caraballo disputed that he was aware of any additional work that Asaro wanted him to perform on the last day that Caraballo worked, that Caraballo

had corrected his lateness issues, and that Caraballo was not given a final warning prior to being discharged. See Tr. 995-1001, 1043 (Asaro); Tr. 405-06, 459-60, 462-63, 473, 1507-08, 1511-12 (Caraballo). Asaro did not explain why he did not listen to Caraballo prior to terminating him.

Jaby Sadio. Neither Edelman nor Asaro spoke to Sadio about Guevara's allegation that Sadio was trying to steal pineapple. See Tr. 1028 (Asaro); Tr. 1170-71 (Edelman). If Edelman or Asaro had spoken to Sadio, they would have discovered that the facts were not as clear as Guevara may have led them to believe. Since Sadio was a good worker who had never been disciplined, see Tr. 1045 (Asaro), Tr. 362-63 (Sadio), the decision not to speak to Sadio, contrary to the Company's practice, suggests that Edelman and Asaro were eager to be rid of Sadio because of his support for Local 1181.

C. The Company's reliance on individual supervisor discretion supports a finding of unlawful discrimination.

The Company contends and/or presented testimony as follows: the Company grants its supervisors and lower-level managers discretion in disciplinary matters short of discharge. During the pertinent period, only discharges required the approval of Edelman and/or Asaro. In all instances other than theft, disciplinary decisions, including discharges, are made using subjective criteria, and consistency of discipline is not an objective or monitored. The Company does not train

supervisors in appropriate employee discipline. See Tr. 762-63, 765-66, 768, 770-71, 772, 1119 (Edelman); Tr. 1032-35, 935-38, 970, 985-86, 987-88 (Asaro).[6]

Based on these assertions, the Company contends that disparate treatment is not evidence, or at least can not establish, that the Company discriminated against employees because of their protected union activities.

The Company's claimed reliance on supervisor discretion and indifference to consistent treatment of its employees in disciplinary matters is a vulnerability rather than a strength of the Company's position. Such an approach to workplace discipline facilitates unlawful discrimination. See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 372 (2011) (Ginsburg, J., concurring in part and dissenting in part) ("The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects."). Employers adopt guidelines for disciplinary actions, train managers and supervisors, and review disciplinary

[6]The Company's witnesses' testimony about the importance (or lack thereof) of consistent treatment of employees in disciplinary matters reflects another reversal from the Company's positions articulated in its position statements. The Company contended in every position statement that the disciplinary actions in issue were consistent with the Company's disciplinary practices. See GC Ex. 31 at 5 (position statement regarding Caraballo); GC Ex. 34 at 4-5 (position statement regarding Daniels); GC Ex. 35 at 5 (position statement regarding Miranda); GC Ex. 36 at 3-4 (position statement regarding Sadio); GC Ex. 37a at 5-6 (position statement regarding Diallo). The testimony is most likely another attempt by the Company to fabricate a defense for its discriminatory disciplinary actions since the evidence refutes the Company's assertions in its position statements that the discriminatees and similarly-situated employees were treated consistently.

actions for consistency to minimize discrimination and liability therefor. Absent such reasonable measures, the Company's managers and supervisors were free to engage in all types of discrimination, including discrimination based on their own perceptions of which employees supported and opposed union representation.

In this respect, at least the Company's managers who made the discharge decisions in issue had no prior experience with union organizing campaigns. See Tr. 1029 (Asaro); Tr. 1168 (Edelman); see also Tr. 1386 (Peters). But all of the supervisors and managers knew that the Company opposed Local 1181's efforts to represent the Company's employees. See Tr. 1029-1030 (Asaro); Tr. 1162-63 (Edelman); Tr. 1217 (Guevara); Tr. 1325-26 (Peters); Tr. 1418-19 (Arsova).

The Company's position is, in any event, incorrect as a matter of law. The Board does not consider evidence of disparate treatment only when an employer claims to seek to discipline employees consistently. Instead, disparate treatment is always evidence of discriminatory animus. Consideration of instances of disparate treatment is important, among other reasons, because direct evidence of unlawful motivation is rarely available. See, e.g., Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069, 1099 (2004).

Accordingly, under well-established Board law, the evidence of disparate treatment adduced at the hearing demonstrates that the Company disciplined employees because of their support for Local 1181. The Company's explanation

that the disciplinary actions in issue merely reflect routine exercises of managerial and supervisory discretion is no explanation at all why such discretion was exercised to impose harsher disciplines, and certainly not a sufficient explanation to refute the evidence that such actions were motivated by unlawful discrimination.

D. That the Complaint does not allege that the Company disciplined more Local 1181 supporters is not a defense to the alleged unfair labor practices.

At the hearing, the Company suggested that it would make arguments to the effect that its lawful motives for disciplining the discriminatees are demonstrated by the absence of allegations that it unlawfully disciplined other employees who, like the discriminatees, engaged in conduct that was, or could be perceived as, assisting or supporting Local 1181. For example, the Company contends that there is no reason to infer that it unlawfully discharged Local 1181 supporters because it (allegedly) discharged fewer employees during the election period. See Tr. 1576.

The Board has long correctly rejected such arguments. For example, in 1950, the Board said:

> We have frequently held . . . that an employer's failure to discharge all the union adherents does not necessarily indicate an absence of discriminatory intent as to those [the employer] did discharge.

W. C. Nabors, 89 NLRB 538, 541-42 (1950), enf'd, 196 F.2d 272, 276 (5th Cir. 1952) ("The fact that respondent retained some union employees does not exculpate him from the charge of discrimination as to those discharged."), cert.

denied, 344 U.S. 865 (1952); see also Fresh & Green's of Washington, D.C., LLC, 361 NLRB 362, 362 n.1 (2014) ("'[a] discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not take similar actions against all union adherents.'") (quoting Nor-Cal Security, 270 NLRB at 552); Trus Joist MacMillan, 341 NLRB 369, 381 (2004) (same).

The Company's fallacious defense that it kept on Union supporters is the equivalent of people accused of prejudice responding that some of their friends are _____ (insert name of appropriate group). Courts informed the President of the United States this past year that arguments like the Company's must fail:

> The argument has also been made that the Court cannot infer an anti-Muslim animus because the [Executive Order] does not affect all, or even most, Muslims. The major premise of that argument – that one can only demonstrate animus toward a group of people by targeting all of them at once – is flawed. . . . It is a discriminatory purpose that matters, no matter how inefficient the execution.

Aziz v. Trump, 234 F. Supp.3d 724, 737 (E.D. Va. 2017).

The record evidence demonstrates that the Company responded to the Union organizing, among other ways, by discharging employees and that the Company continued to discriminate against Union supporters after the election. If the Company did not discriminate against other Union supporters, that would not be a defense.

E. Tequaan Daniels' disciplinary "record" does not reflect genuine progressive discipline but rather the Company's desire to manufacture a paper trail that would appear to justify his discharge.

In addition to the Company's shifting explanations for discharging Daniels, Daniels' disciplinary "record" suggests that the Company was motivated by discriminatory animus each time the Company disciplined him in January 2017.

The Company asserts that it discharged Daniels on January 12, 2017 after issuing him a first warning on January 5, 2017 and a second warning on January 8, 2017, both for tardiness. See GC Ex. 34 at 3; GC Exs. 15-16.

However, true progressive discipline is not simply a three strike rule. Progressive discipline provides an employee a reasonable opportunity to conform his/her workplace conduct to the employer's expectations over time by providing the employee notice that failure to correct performance issues may result in harsher disciplinary action or discharge.

Workplace performance issues can not always be instantaneously corrected. For example, an employee may require time to address the cause of being late. If the issue is childcare, an employee may require time to adjust existing arrangements. Until a new arrangement is made, the employee may not be able to make the necessary changes to his or her schedule. If the issue is unreliable early morning public transportation options, an employee may need a period of trial and

error to find an alternate route or to determine how early he/she needs to leave home to report to work on time.

Until January 5, 2017, the day the Regional Director approved the Stipulated Election Agreement, Daniels had no written disciplinary record. Thus, if the Company discharged Daniels at that time for attendance issues, the Company would not have been able to explain why it disciplined him more harshly than similarly-situated employees.

Starting on January 5, 2017, the Company took actions against Daniels each day he was scheduled to work, culminating in his discharge. As set forth below, between January 5, 2017 and the date of Daniels' discharge (disputed, but January 12, 2017 according to the Company), the Company did not permit him to perform his job as a runner and only permitted him to work one day at all, washing totes in an area where he was isolated from co-workers. See Tr. 235-26, 254 (Daniels). Daniels has no recorded time for any day after January 7, 2017. See GC Ex. 5(a).[7]

> January 5: The Company issued Daniels a first warning for tardiness. See GC Ex. 15.
>
> January 6: The Company sent Daniels home (according to Daniels, for calling in to his supervisor rather than a general number). See Tr.

[7]The Company contended in its closing argument that Daniels "admitted he really has no recollection of when things happened." Tr. 1571. Daniels actually testified that he was "not sure of the dates[,]" referring to events in January 2017, Tr. 1555 (emphasis supplied), but testified credibly as to pertinent events and the sequence in which they occurred.

233-34 (Daniels); GC Ex. 5(a) (Daniels' timecard, Bates Stamp JP001767).

January 7: The Company assigned Daniels to wash totes. See Tr. 235-26, 254 (Daniels).

January 8: The Company issued Daniels a second warning for tardiness and sent him home. See GC Ex. 16; Tr. 237-38 (Daniels); Tr. 1205 (Guevara).

January 9: Daniels was not scheduled to work and did not work. See Tr. 239 (Daniels).

January 10: Daniels was not scheduled to work and did not work. See Tr. 239 (Daniels).

January 11: According to Daniels, the Company told him not to report. See Tr. 239-40 (Daniels).

January 12: According to the Company, it discharged Daniels on this date. See Resp. Ex. 26.

The Company knew that Daniels was late sometimes due to childcare problems. See Tr. 1225 (Guevara). By issuing Daniels a second warning only three days after the first warning, and then discharging Daniels only four days after the second warning without telling Daniels that he was on a final warning, see Tr. 271 (Daniels), the Company did not afford Daniels a reasonable opportunity to improve in response to the Company's sudden expressions that his lateness was a problem requiring correction.

The Company's rush to issue purely punitive – rather than constructive – disciplinary warnings after months of arriving late (see Tr. 1203, 1225, 1239 (Guevara)) further reveals the Company's articulated grounds for disciplining and

discharging Daniels as pretexts for the Company's true motive: discriminatory animus against Daniels for his support for Local 1181.

II. THE COMPANY'S BLANKET DENIALS THAT IT COMMITTED UNFAIR LABOR PRACTICES CAN NOT BE CREDITED.

The Company denies all of the alleged unfair labor practices ("ULPs"). The Company would have the Board believe that the Company's response to the Petition was simply to communicate its position to its employees at group meetings and in flyers, and then respect its employees' decisions. The Company's managers and supervisors generally claim that they only spoke to individual employees about the Union when employees approached them with questions; the managers and supervisors generally responded that they did not know the answers to the employees' questions. See Tr. 1167-68 (Edelman); Tr. 1190, 1208-09, 1218-19 (Guevara); Tr. 1326 (Peters); Tr. 1419-20 (Arsova). Otherwise, according to the Company and its counsel, managers and supervisors were busy working and the alleged ULPs were all imagined, fabricated, or misconstrued due to the "almost to the point of sort of paranoia" of the General Counsel's witnesses. See Tr. 1567.

This is a fraudulent depiction of the Company's response to the Union organizing effort. Once the Company received the Petition, the Company adopted a wartime posture to defeat the Union. This is evident even without considering the Company's many ULPs. Understanding the Company's actual approach is important in evaluating the evidence directly pertaining to the ULPs.

The Company was aware of the Union organizing campaign long before Local 1181 filed the Petition. Guevara testified that in September or October 2016 he saw groups in the building meeting with the Union representative and employees asked him about the Union. See Tr. 1190, 1216. Asaro testified that he learned about the Union when he saw flyers a few weeks before he was handed a packet by the Union organizer shortly before Christmas. See Tr. 922-23. Chief Operating Officer Peter Kay ("Kay") said he knew about the Union efforts about two months before the election. See Tr. 1441. Edelman's unique testimony that he was not aware of Union activity between August or September, when he saw flyers, and when he received the Petition should not be credited. See Tr. 1091-92, 1093, 1138-39.

Edelman and Asaro approached Union organizer Jean Nash ("Nash") before the Union filed the Petition and asked Nash, referring to a flyer, "What is this about?" Tr. 1092 (Edelman). Although Nash did not provide Edelman and Asaro any information, that the Company did not know what Nash was doing or at least did not make any further effort to ascertain the reason for his presence at the Falchi Building does not ring true. Similarly, Edelman's testimony that he had no idea that Nash worked for a union, just that Nash gave out flyers, again should not be credited. See Tr. 1091-92, 1138-39.

Various managers and supervisors testified that they believed that Union organizer Jean Nash's name was "Nick." See Tr. 921-22 (Asaro); Tr. 1093 (Edelman); Tr. 1328 (Peters); Tr. 1420 (Arsova). This testimony demonstrates that the managers and supervisors communicated amongst themselves about Nash. If the testimony was truthful – which, at least with respect to some managers and supervisors, seems unlikely – such communications are the only apparent explanation for how Company representatives share the same misunderstanding. No Company witness claimed that Nash misrepresented that his name was "Nick."

In late December 2016 or early January 2017 (i.e., shortly after Local 1181 filed the Petition), Company managers and supervisors met with counsel at the Falchi Building for training on campaigning. See Tr. 1056-57, 1060-61, 1067 (Khan); Tr. 981, 1016, 1019 (Asaro); Tr. 1090 (Edelman); Tr. 1216-17 (Guevara); Tr. 1325-26 (Peters); Tr. 1418-19, 1431-32 (Arsova).

In the approximately one month between the filing of the Petition on December 21, 2016 and the election on January 23, 2017, the Company subjected employees to a barrage of anti-Union communications. Managers held about 15 meetings with small groups of five to seven workers, and officers and/or managers held three meetings with large groups of about 100 to 125 workers. See Tr. 1097, 1140-43, 1160 (Edelman); Tr. 1218 (Guevara); Tr. 978-79 (Asaro); GC Ex. 22 (transcript at 1-2). At the last large group meeting, on the last weekday before the

election, the Company's speakers were Marcus Antebi ("Antebi"), the Company's founder, part-owner, and CEO, and Kay, the Chief Operating Officer. See GC Ex. 23; Tr. 1442, 1449-51 (Kay). The Company also distributed multiple flyers in multiple languages to employees. See Resp. Ex. 17. In the meetings and flyers, the Company routinely trashed the Union. See, e.g., GC Exs. 22, 23; Resp. Ex. 17.

Unlike the other Company witnesses, Asaro admitted that, as part of the Company campaign, "we . . . talked to the employees." See Tr. 926.

During the election period, Company officers and managers were in more than daily contact with outside counsel. The privilege log reflects 109 such contacts between December 27, 2016 and January 22, 2017, see GC Ex. 33, and the privilege log does not even reflect written communications that were not withheld from the Company's response to Counsel for the General Counsel's subpoenas or non-written communications. Edelman and Asaro were regular senders and recipients of email correspondence with counsel. See id.

Shortly after the Union filed the Petition, the Company "smoked" the previously clear windows between its work areas and the hallway at the Falchi Building. See Tr. 288 (Hedge). Edelman testified that this occurred before the election period, see Tr. 1139, but Union organizer Nicholas Hedge is a more credible witness than Edelman. Moreover, the Company presented no documents

that would have established when this occurred. Such documents should have been uniquely in the Company's possession.

Weekly Thursday meetings of Company management in the Falchi Building hallway also happened to commence in January 2017. See Tr. 1020 (Asaro).

On January 10, 2017, Peters emailed Edelman and Asaro when he observed that the "Union guy" came to the building with four other people. See GC Ex. 6.

Daniel Uvaldo ("Uvaldo") testified that he first saw signs about not texting or calling using cellphones around January 2017. See Tr. 709, 710-11.

Building security approached union organizers shortly before the election and told them not to talk to Juice Press employees. See Tr. 307-08 (Hedge).

Work schedules that might have contained pertinent evidence and that the Company otherwise produced were not even created for January and February 2017. See Tr. 50-51, 73 (Waterman). No Company witness explained why schedules were not created for this period, which includes the election period.

The Board should evaluate the General Counsel's allegations of multiple ULPs and the Company's defenses in the context of the Company's aggressive and adversarial response to the Union organizing effort, not the restrained response that the Company falsely suggests.

III. REMEDIES FOR THE COMPANY'S ULPs SHOULD INCLUDE A *GISSEL* BARGAINING ORDER.

Charging Parties may seek, and the Board may award, appropriate remedies not sought by the General Counsel. See Kaumagraph Corp., 313 NLRB 624, 624-25 (1994); Durham School Servs., 360 NLRB 694, 694-95 (2014) (directing revision to notice, and to standard notice language in future cases, requested by Charging Party union); United States Postal Serv., 364 NLRB No. 27, slip op. at 2-3 (2016) (granting Charging Party union request that Respondent be ordered to produce information without redactions or restrictions); Boland Marine and Mfg. Co., 228 NLRB 1304, 1304-05 (1977), enf'd, 573 F.2d 1308 (5th Cir. 1978) (table) (issuing remedies for unilateral change in terms and conditions of employment, including offers of reinstatement and make whole relief for affected employees, requested by Charging Party).

Local 1181 seeks as a remedy in this case a bargaining order pursuant to the Supreme Court's decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). To demonstrate that such a bargaining order is appropriate, Local 1181 need not show the impossibility of ensuring a fair rerun election through traditional remedies, but only that that possibility is slight because of ULPs by the Company that tend to undermine majority support and impede election processes. See id. at 613-15; Novelis Corp., 364 NLRB No. 101, slip op. at 4, 5 (2016). In any event, based on Local 1181's showing of support of a substantial majority of employees,

the Company's hallmark and many other serious ULPs, the impact of the ULPs on a workforce of people paid minimum wage or thereabouts and whose first language in many instances is not English (substantially undermining employee support for Local 1181 or willingness to express support for Local 1181), the identity of the perpetrators of the ULPs, the continuation of the ULPs after the election, and other factors discussed below, traditional Board remedies will not be nearly sufficient to make possible a free and fair rerun election. Accordingly, employee sentiment once expressed through cards would, on balance, be better protected by a *Gissel* bargaining order than a rerun election.

We review below the traditional factors the Board considers when determining whether a *Gissel* bargaining order is appropriate.

Local 1181's majority support. On December 21, 2016, when Local 1181 filed the Petition, Local 1181 had the support of the overwhelming majority of employees as demonstrated by the 151 signed cards Local 1181 presented to the Region as its showing of interest. See CP Ex. 2. By that time, Local 1181 had stopped collecting cards. Still, once the parties entered a Stipulated Election Agreement approved on or about January 5, 2017, Local 1181 had, by its present

count, cards signed by 116 of the 192 employees on the Voter List issued on or about the same date.[8]

Hallmark violations. The Company's "hallmark" violations include perhaps the quintessential violation – targeted discharges during the election period of employees who were union activists (Daniels and Sadio) – as well as granting employees additional pay to mollify employees with a grievance even though the Company did not agree that the grievance had merit and promising and offering employees wage increases.

The discharges of Daniels and Sadio occurred within a few days of each other, and both within ten days of the Stipulated Election Agreement. Daniels spoke to Nash more than any other employee, generally under the watchful eye of managers and supervisors, and had been chosen by Local 1181 to be its poll watcher. See Tr. 123-27, 128 (Nash); Tr. 224-25, 228-29, 231-32 (Daniels); Tr. 299-300 (Hedge). Sadio was terminated after co-worker (now supervisor) Milagros Fernandez threatened Sadio that she would tell Guevara that Sadio was speaking to Nash, and after Sadio repeatedly told Guevara, upon Guevara's inquiries, that he supported the Union. See Tr. 130-32 (Nash). The Company had also tasked Paredes with discovering employees' union sympathies. See Tr. 737

[8]Local 1181 submitted the cards it collected into evidence for *in camera* review against the Voter List. See CP Exs. 3-4.

(J. Guitia); Tr. 845-46, 848-49, 876 (R. Guitia). Caraballo knew that Daniels and Sadio were vocal supporters of Local 1181. See Tr. 425-29 (Caraballo).

The discharge of Daniels and then of Sadio had an immediate and lasting effect, chilling employees' communications with Union organizers. Employees were dismayed that the Company discharged Daniels and Sadio. See Tr. 304-05 (Hedge); Tr. 128-29, 134-35 (Nash). Even Asaro admitted that Sadio was a good worker. See Tr. 1045. These discharges were sufficient to send a message to employees that the Company could discharge any employees – no matter how good at their jobs – if the Company perceived that they supported Local 1181.

With respect to the payment to employees, employees complained at a campaign meeting the Company held on January 17, 2017 that they were sent home early the prior Friday. See GC Ex. 22 (transcript at 7); Tr. 433-35 (Caraballo). Employees contended that they were sent home because they were perceived as supporting Local 1181. See GC Ex. 22 (transcript at 8, 16). Asaro or Edelman denied that this was why employees were sent home. See id. at 8, 16; Tr. 440-43 (Caraballo). Edelman said he would speak to Peters to find out why employees were sent home. See GC Ex. 22 (transcript at 8); Tr. 443 (Caraballo). When employees persisted, Edelman or Asaro stated in the meeting that the Company would pay the affected employees for their lost hours without investigating. See GC Ex. 22 (transcript at 16-17); Tr. 444-45 (Caraballo). In

other words, less than a week before the election, the Company paid employees for time that they may not have been entitled to be paid so the employees would not be upset with the Company and to dissuade them from supporting the Union.

In addition to Paredes offering employees $1 wage increases for committing to vote against the Union and Guevara and Asaro promising employees a raise, Antebi spoke in the large meeting the Company held with about 100 to 125 of its employees the last weekday preceding the election about the then-recent increase in employees' wages and the increases employees would receive each of the next two years. See GC Ex. 23 (transcript at 4); Tr. 1442 (Kay). However, Antebi did not mention that state law mandated these increases. Antebi also promised that employees would be paid fairly. See GC Ex. 23 (transcript at 5). The Company violated the Act by promising its employees substantial hourly wage increases in the then-coming two years as if the increases were discretionary. See Complete Carrier Servs., Inc., 325 NLRB 565, 567-68 (1998) (promises of benefits); Gerig's Dump Trucking, Inc., 320 NLRB 1017, 1017 (1996), enf'd, 137 F.3d 936 (7th Cir. 1998) (same).

The size of the bargaining unit, the number of employees affected by the Company's ULPs, and the impact of the violations on Local 1181's majority support. After the Company's relentless campaign of ULPs, Local 1181 received 38 votes in the election, 79 votes were cast against Local 1181, and 3 ballots were

challenged. See Decision on Objections at 2; Evergreen America Corp., 348 NLRB 178, 263 (2006), enf'd, 531 F.3d 321 (4th Cir. 2008) (bargaining order supported by difference between number of card signers and votes cast for union).

That the Company's violations affected, or were disseminated to, all or significant portions of the bargaining unit is particularly supportive of a bargaining order. See Evergreen America, 348 NLRB at 180-81.

Most or all employees were subjected to and/or aware of the Company's relentless and pervasive campaign of serious ULPs, such as surveilling employees engaging in Union activity, interrogating employees about their union activities, threats, promises, and directing employees not to speak about the Union or to Union organizers in the election period. See Garvey Marine, Inc., 328 NLRB 991, 993, 994 (1999), enf'd, 245 F.3d 819 (D.C. Cir. 2001) (large number of ULPs support bargaining order).

Employees were also aware that the Company discharged Daniels and Sadio. Nash testified that many employees came to speak to him about Daniels' and Sadio's discharges. See Tr. 128-29, 134-35, 183-86. Hedge testified that 15 to 20 employees spoke to him about Daniels' and Sadio's discharges. See Tr. 335; see also Tr. 304-05. All the employees that worked with Daniels asked him about his termination. See Tr. 254 (Daniels). Caraballo knew that Daniels and Sadio were

terminated and knew that they were vocal supporters of Local 1181. See Tr. 425-29 (Caraballo).

Nash and Hedge identified the discharges of Daniels and then Sadio as the turning point in Local 1181's campaign. After the discharges, far fewer employees were willing to speak with Local 1181 organizers. See, e.g., Tr. 121-23, 162-65, (Nash); Tr. 286-87, 298-302, 303, 304, 319, 336-38, 343 (Hedge). For example, Hedge testified as follows:

> Q And you know, during this time in December prior to the petition filing, how did the Juice Press employees react to your conversations?
> A Well, you know, when I first got there, the people were -- you know, Jean was bringing me around -- Jean Nash was bringing me around to the people. He knew them all, pretty much everybody by name. He introduced me to them all. They were very happy to see me. He -- everybody was interested in what I had to say. There were -- there was quite a few Spanish-speaking people that Jean would be with me, and he would help me communicate with.
> Q From what you observed, did any of these employees at this period of time in December before the petition was filed, did they have any hesitation in talking to you or Jean?
> A No, not at all.

Tr. 286-87.

> Q Okay. And so you said that people were less willing to talk to you after Tequaan fired?
> A Yes.
> Q Can you describe how they were less willing to talk to you?
> A Well, when you, when you go to a table that before would be smiling and open to you, and now they would put their eyes down and not want to talk to you. You know that there was, that was a big difference.

Q Okay. Had anyone before Tequaan got fired, had anybody put their eyes down and tried to not talk to you?
A No, I had a very warm reception when I first started going there.
Q Okay. That was from everybody you talked to?
A Yes.

Tr. 300-01.

The manner of Daniels' termination also demonstrates the Company's intent to send a message to all of its employees. There is no other apparent explanation for Guevara directly involving employee Raul Guitia in Daniels' termination. Guevara summoned Guitia to the hallway, terminated Daniels over Guitia's phone, and then told Guitia to tell Daniels that he was fired. See Tr. 843-44 (R. Guitia); see also Tr. 239-40 (Daniels). From these unusual and unexplained circumstances, the Board may conclude that the discriminatory discharge was widely disseminated to other employees. See Garvey Marine, 328 NLRB at 992, 995.

The identity of the perpetrators of the ULPs. "The coercive and lasting effect of the Respondent's unlawful conduct was magnified by the fact that many of the violations were committed by high management officials, a point that has consistently been emphasized by the Board as supporting the issuance of a bargaining order." Evergreen America, 348 NLRB at 181; see also Novelis Corp., 364 NLRB No. 101, slip op. at 5; M. J. Metal Prods., Inc., 328 NLRB 1184, 1185 (1999), enf'd, 267 F.3d 1059 (10th Cir. 2001). The lasting effect is also compounded by, or likely to be compounded by, the fact that seven Company

officials, including the Company's founder, part-owner, and Chief Executive Officer, Antebi, the Company's Chief Operating Officer, Kay, and all of the top managers and supervisors responsible for overseeing the Company's day-to-day operations at the Falchi Building (Edelman, Asaro, Guevara, Peters, and Arsova) engaged in the ULPs. See Evergreen America, 348 NLRB at 181. Edelman also appears to be an officer of the Company as he holds the title of Vice President of Manufacturing. See Complaint ¶13; Answer ¶13. Antebi's and Kay's personal involvement in ULPs on the last weekday before the election and Antebi's involvement after the election reinforces all other factors supporting Local 1181's argument that a *Gissel* bargaining order is a necessary remedy.

As discussed above, see supra pp. 3-5, 11, Edelman and Guevara were involved in Daniels' discharge and Edelman, Asaro, and Guevara were involved in Sadio's discharge. All of the mentioned officers, managers, and supervisors were involved in at least one violation of Section 8(a)(1), and most were involved in many more instances of violations.

The timing of the ULPs and the likelihood that violations will recur. The Board also considers the timing, number, and seriousness of non-hallmark violations. See, e.g., Evergreen America, 348 NLRB at 180; M.J. Metal Prods., 328 NLRB at 1184. In addition to the Company's hallmark violations, the Company responded to the organizing campaign by committing many ULPs in the

approximately one month between the day Local 1181 filed the Petition and the day of the election. The hallmark and non-hallmark violations during the abbreviated election period are specified in 18 paragraphs of the Complaint. See Complaint ¶¶15-27, 31-35; Novelis Corp., 364 NLRB No. 101, slip op. at 4, 5 (cumulative impact of many and serious ULPs in short election period supports bargaining order).

The Company also committed many ULPs after the election. These ULPs are set forth in paragraphs 27-30 and 38-40 of the Complaint.

The Board has observed that continued ULPs after an election are evidence of a strong likelihood that unlawful conduct will recur in the future, especially if the Board directs a rerun election, and that the effectiveness of traditional remedies will be diminished. See Novelis Corp., 364 NLRB No. 101, slip op. at 5; Evergreen America, 348 NLRB at 181; M.J. Metal Prods., 328 NLRB at 1185; Garvey Marine, 328 NLRB at 995.

Here, the Company continued to commit hallmark violations of the Act after the election, including the discriminatory discharges of Diallo and Caraballo, and to engage in, among other non-hallmark ULPs, unlawful surveillance and interrogation of employees in pursuit of the Company's ongoing efforts to identify and rid itself of supporters of Local 1181. All of these violations were committed while ULP charges and Objections to the conduct of the election were pending,

demonstrating the Company's unrelenting hostility to the Union and that the Board's procedures are not a deterrent to the Company's efforts to prevent its employees from securing union representation. Thus, there are compelling reasons to conclude that the Company's ULPs will continue and recur.

In sum, a bargaining order is appropriate because the Company's egregious and extensive ULPs targeted and undermined Local 1181's more than majority support, involved several key Company officers, managers, and supervisors, continued post-election so the remnants of Local 1181 support could also be eliminated, and make a fair election unlikely because traditional Board remedies are unlikely to erase the coercive effect of the Company's misconduct.

IV. ABSENT A BARGAINING ORDER, THE ELECTION MUST BE RERUN.

Local 1181 filed timely Objections to conduct affecting the results of the January 23, 2017 election. After the Decision on Objections, the remaining Objections to be considered in this hearing are to misconduct that is substantially identical to the ULPs by the Company alleged in the Complaint that occurred on or before the date of the election.[9] Accordingly, because the Company should be found to have committed the pertinent alleged ULPs, it follows that the remaining Objections also have merit.

[9]Counsel for the General Counsel withdrew paragraph 36 of the Complaint, which included allegations pertaining to employee Jerlin Paulino. To the extent Objection 2 overlaps with paragraph 36, Local 1181 does not rely for its Objections on the allegations set forth in paragraph 36.

The ULPs that occurred within the election period could have affected the outcome of the election. See, e.g., the cases cited in footnote 5 at page 9 of the Decision on Objections. Accordingly, Local 1181's remaining Objections should be sustained, the election results set aside, and a new election conducted if no *Gissel* bargaining order issues (Local 1181 respectfully submits that one should).

CONCLUSION

For the foregoing reasons, the Board should conclude that the Company violated the Act as alleged in the Complaint and engaged in misconduct affecting the results of the January 2017 representation election. The remedies for the Company's unlawful conduct should include an order setting aside the election results and a *Gissel* bargaining order. In the absence of a bargaining order, the election results should be set aside and a new election conducted.

Dated: January 16, 2018

Respectfully submitted,

By: /s/*Richard A. Brook*

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